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IN THE

Supreme Court of the United States

October Term, 1998

SHARPER IMAGE CORPORATION,

Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeals of Florida, First District

BRIEF OF *AMICUS CURIAE* DIRECT MARKETING ASSOCIATION, INC. IN SUPPORT OF PETITIONER

MARTIN I. EISENSTEIN*
GEORGE S. ISAACSON
DAVID W. BERTONI
BRANN & ISAACSON, LLP
184 Main Street
Lewiston, Maine 04243-3070
(207) 786-3566

ROSCOE B. STAREK, III
Senior Vice President -
Catalog Industry
Direct Marketing Association, Inc.
Washington, D.C.

**Counsel of Record*

Balmar Legal Publishing Services, Washington, DC (202) 682-9800

TABLE OF CONTENTS

Page[s]

STATEMENT OF INTEREST 1

I. DMA: An Overview 1

II. DMA's Interest In This Case 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

I. DMA's Members Are Entitled to Meaningful Backward-Looking Relief 5

II. Florida Has Made No Attempt to Cure Past Discrimination In Taxation, But Instead Has Assessed or Threatened To Assess DMA Members. 7

III. Failure To Reverse The District Court of Appeal's Decision Would Have Profound Repercussions For DMA's Members And Other Taxpayers In Jurisdictions Throughout the United States, Including Florida. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page[s]**

American Trucking Ass'n, Inc. v. Smith, 496 U.S. 167 (1990) 6

D. H. Holmes Co., Ltd. v. McNamara, 486 U.S. 24 (1988) 1

Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) 7

Department of Revenue v. Magazine Publishers of America, Inc., 604 So.2d 459 (Fla. 1992) 3,7

Dryden v. Madison County, 118 S.Ct. 1162 (1998) 7

H.J. Wilson v. State Tax Commission, No. 97-CA-00121-SCT, 1998 WL 427261 (Miss. July 30, 1998) 9

Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993) 5, 6, 7

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 31 (1990) 2, 5-7

Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442 (1998) 5, 7

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 1

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 7

Thayer v. South Carolina Tax Commission, 413 S.E.2d 810 (S.C. 1992) 9

U.S. CONSTITUTION, STATUTES AND REGULATIONS

35 Ill. Comp. Stat. Ann. 105/18-18 (West 1996) 8

Alaska Stat. § 01.10.030 (1998) 8

Cal. Gov't Code § 55821 (West 1997) 9

Del. Code Ann. Tit. 5, § 1110 (1997) 8

Fla. Stat. Ann. § 212.21 (West 1989) 4, 5, 8

Fla. Stat. Ann. § 95.091(3)(a) (1997) 8

Page[s]

Kansas Stat. Ann. § 79-2011 (1997) 9
Minn. Stat. Ann. § 168.76 (West 1986) 9
Miss. Code Ann. §27-10-23 (Supp. 1998) 9
N.J. Stat. Ann. § 54:32B-29 (West 1986) 9
N.Y. Real Prop. Tax Law § 1172 (McKinney 1989) 9
R.I. Gen. Laws §44-7-21 (1997) 9
R.S. Mo. § 1.140 (1997) 9
S.C. Code Ann. § 10-52-6 (Michie 1998) 9
S.D. Codified Laws § 10-52-6 (1998) 9
W. Va. Code § 11-21-94 (1998) 9
Wash. Rev. Code Ann. § 82.18.900 (West 1997) 9

The Direct Marketing Association, Inc. ("DMA") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by Sharper Image Corporation ("Sharper Image"). Written consents of the parties are filed herewith.[1]

STATEMENT OF INTEREST

I. DMA: An Overview

DMA, a not-for-profit corporation, is the oldest and largest trade association representing mail order sellers and advertisers. Since the late 19th century, mail order marketing has attracted fledgling businesses and entrepreneurs who recognize the enormous opportunity of selling their products nationally. DMA has over 3,200 members from all fifty states and forty foreign countries. Most of DMA's members, like Sharper Image, sell by means of catalogs. They send those catalogs and other advertising materials through the mail, receive orders by mail and telephone, and deliver goods by common carrier.

In the last decade, DMA has filed *amicus curiae* briefs in state tax cases before this Court that have raised constitutional questions directly affecting its members in conducting their interstate business, including in *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 n.10 (1992) (citing DMA's brief), and *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988).

II. DMA's Interest In This Case

In this case, the court below acknowledged that taxing catalogs, while exempting newspapers and religious publications, violated Sharper Image's First Amendment rights. It held that Sharper Image had standing to raise this

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[1] No counsel for a party in connection with the petition for writ of certiorari authored this brief in whole or in part, and no other person or entity, other than *amicus curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

constitutional challenge because it was injured by the exemption, a holding that was never challenged. *See* Appendix to Petition for Writ of Certiorari ("App.") at 10a. Nevertheless, the court denied any relief to cure this unconstitutional discrimination. The only remedy provided was invalidation of the tax exemption on a prospective basis so that previously exempt publications would be taxed in the *future*. The *prior* unconstitutional discrimination, however, was not addressed. No effort was made to tax newspapers and religious publications for past periods. Moreover, the state has refused to abate the unconstitutional assessment against Sharper Image.

The Florida Department of Revenue (the "Department") has assessed, or threatened to assess, DMA's members--in addition to Sharper Image--a use tax on catalogs for the same periods that newspapers and religious publications were fully exempt. The stipulations in this case indicate that the Department has not even attempted to assess newspapers and religious publications that received the benefit of the unlawful exemptions, yet it insists on collecting such taxes from DMA members. Initial Brief of Sharper Image, Fla. Dist. Ct. App., at 18-19 (collecting record citations). This is so despite this Court's admonition in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) that, "the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any constitutional deprivation." If the decisions below are sustained, therefore, DMA's members will find themselves liable for taxes which violate their constitutional rights without being afforded the due process protection of the Fourteenth Amendment.

Moreover, if upheld, the decisions below will not only impact on the Florida remedies available to DMA's members, they will also resonate in other states by providing a basis for such states to avoid providing the due process protections this Court has required. At least fifteen states have statutory provisions similar to those of Florida that, on their face,

preclude reasonable, backward-looking remedies for unconstitutional taxation.

In those states, as well as in Florida, state tax officials would be free to assess--and enforce--discriminatory and unconstitutional taxes without providing adequate remedies to those adversely affected. DMA's members would be left with the empty victory of having prevailed in the defense of their constitutional rights, but with no relief whatsoever from the discriminatory taxes of the past. Due process requires more than that.

STATEMENT OF THE CASE

DMA relies on the Statement Of The Case set forth at pages 4-8 of the Petition for Writ of Certiorari filed by Sharper Image. DMA notes the following critical aspects of the decision of the District Court of Appeal:

1. The court below ruled that Sharper Image had standing because its "constitutional claim ... involves a content-based approach to taxation of publications ..." App. at 10a. The court rejected the Department's argument that Sharper Image failed to show that it suffered "any injury by having assessed against it a use tax on the distribution of its catalogs ..." App. at 8a. This case involves content-based discrimination between publications, providing a clear basis for standing on the part of the publisher, Sharper Image, against which the unlawful discrimination was carried out.

2. The court below ruled that the newspaper exemption was unconstitutional because of its content-based discrimination between forms of speech and the press. App. at 10a (citing *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459 (Fla. 1992)). The court also noted that Sharper Image's claim of unconstitutionality based upon the religious publications exemption might also be meritorious, but declined to reach that issue "given that the Florida Supreme Court has already found the newspaper exemption unconstitutional ..." App. at 11a.

3. Although finding that Sharper Image had standing, and having concluded that the company's constitutional claims were meritorious, the court below nonetheless refused to strike down the use tax assessment on Sharper Image's catalogs. Specifically, it rejected Sharper Image's claim that it should be entitled to "a meaningful backward-looking remedy" to address the unconstitutionality of Florida's sales and use tax statute.

The court relied solely upon a Florida statute which provides, in pertinent part, that if any of its sales and use tax exemptions are declared unconstitutional "such declaration shall not affect the tax or taxes imposed herein, but such . . . use . . . exempted or attempted to be exempted from the tax . . . shall be subject to the tax . . . to the same extent as if such exemption . . . had never been included herein." App. at 14a (quoting Fla. Stat. Ann. § 212.21 (West 1989)). According to the court below, this statute dictates that the *only* appropriate remedy in Sharper Image's case is to eliminate the unconstitutional exemption *on a prospective basis*, while leaving the assessment (and the tax exemption previously and unlawfully extended to sellers of newspapers and religious publications) intact. App. at 14a. In other words, in the eyes of the court below, § 212.21 creates a state statutory basis for providing prospective relief only. Although this remedy prevents unconstitutional taxation in the *future*,[2] it does not eliminate the past discrimination by abating the assessment of Sharper Image for the very same periods that newspapers and religious publications were exempt.

REASONS FOR GRANTING THE WRIT

This case involves an approach by a state's legislature-- accepted and applied by its courts-- that precludes reasonable, retroactive relief for an admittedly unconstitutional tax

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[2] The bar to discrimination in the future only relates to the exemption for newspapers. The exemption for religious publications is still on the books and has not yet been invalidated by the Florida courts.

assessment. This approach has been exacerbated by the Department's continuing efforts to exact taxes from Sharper Image and other distributors of catalogs for time periods when newspapers and religious publications were unconstitutionally exempt from taxation. Indeed, the Department has acknowledged that it has not attempted and will not attempt to tax these other publications.

Under Fla. Stat. Ann. § 212.21, the *only* relief available to parties like Sharper Image is the elimination of the unconstitutional exemption for *future* tax periods. They have *no* recourse whatsoever for assessments covering periods during which the unlawful exemptions were given full force and effect. This is directly contrary to this Court's decisions in *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442 (1998), *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 101 (1993), and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990).

Florida is not isolated in its approach. Other states have also attempted to eliminate retroactive relief under circumstances such as these--either by statute or by the decisions of their courts. Intervention by this Court is necessary to ensure that DMA's members, including Sharper Image, and taxpayers in general have clear, certain, and meaningful remedies for unconstitutional tax assessments. This will prevent an erosion of this Court's long-standing principle that, under the Due Process Clause, a state must provide meaningful retroactive relief to remedy constitutional violations.

I. DMA's Members Are Entitled to Meaningful Backward-Looking Relief

This Court has made clear in several cases that prospective relief, alone, is not a sufficient remedy under the Due Process Clause for an unconstitutional tax assessment. Florida should not be allowed to avoid this rule by applying a statute that deprives taxpayers of any retroactive remedy.

In *McKesson*, *supra*, a Florida liquor excise tax provided preferential rate reductions for distributors of certain local products. 496 U.S. at 23. The Supreme Court of Florida agreed that the excise tax scheme was unconstitutional, but refused to order a tax refund. Instead, it merely enjoined future enforcement of the preferential rate reduction. This Court reversed:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, *the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any constitutional deprivation.*

Id. at 31 (emphasis added). *Accord American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 181 (1990) ("Our decision today in *McKesson* makes clear that once a State's tax statute is held invalid under the Commerce Clause, the state is obligated to provide relief consistent with federal due process principles.") To satisfy due process, "a state may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.'" *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 101 (1993) (quoting *McKesson*, 496 U.S. at 40). Where, as here, a tax scheme is unconstitutional due to its discriminatory effect, the state may only insist upon payment of its tax assessments if it retroactively removes the discrimination. *McKesson*, 496 U.S. At 39-40. It can do so by assessing those taxpayers who enjoyed the benefit of the unconstitutional exemptions. *Id.* Otherwise, it must neither collect nor keep the taxes imposed under its unconstitutional scheme. *Id.*[3]

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[3] In its decision, the Court of Appeal suggests that the meaningful retroactive relief requirement of *McKesson* has no applicability because Sharper Image does not compete with sellers of newspapers and religious publications. App. at 15a. Nowhere in *McKesson* did this Court require a

In *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442 (1998), this Court summarily vacated and remanded a decision of the same District Court of Appeal that denied the post-deprivation remedy of refund of taxes assessed to taxpayers injured by the very same newspaper exemption at issue in this case. There, this Court ruled that "Newsweek is entitled to a clear and certain remedy... for this constitutionally invalid exemption." *See also Dryden v. Madison County*, 118 S.Ct. 1162 (1998) (vacating Florida Supreme Court decision refusing to make a full refund to taxpayers illegally assessed a tax).

II. Florida Has Made No Attempt to Cure Past Discrimination In Taxation, But Instead Has Assessed or Threatened To Assess DMA Members.

The second teaching of *McKesson* is that the state must act *swiftly* to fashion a retroactive remedy if it wishes to retain the taxes it has collected or assessed under a discriminatory tax scheme. Despite having had a substantial opportunity to do so, neither the Florida legislature nor the Department have formulated a meaningful retroactive remedy to cure the discriminatory aspects of its sales and use tax scheme related to the newspaper and religious publications exemptions.

Following the invalidation of the newspaper exemption (by the Supreme Court of Florida in 1992, *see Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459 (Fla. 1992)) and the religious publications exemption (by the United States Supreme Court in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989)), neither the legislature nor the Department

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showing that the taxpayer was in direct competition with those who benefited from the unconstitutional tax exemption. *See Petition for Writ of Certiorari of Sharper Image Corporation* at 14 n.6 (citing *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)). Moreover, Sharper Image satisfied the standing requirements applied by the lower court by demonstrating that it had suffered injury as a result of the unconstitutional exemptions.

took any steps to impose retroactively sales and use taxes on the beneficiaries of these exemptions. Not only does the Department now lack the practical power to do so given its admitted inability to determine even the identities of those taxpayers, it also faces--due to its own inaction--the additional legal hurdle presented by the statute of limitations. Fla. Stat. Ann. § 95.091(3) (a) (an assessment must be made within 5 years from the date the return is filed); Initial Brief of Sharper Image Corporation, Fla. Dist. Ct. App., at 19 (collecting record citations).

Notwithstanding its refusal to impose taxes on the exempt publications, the Department has simultaneously assessed or threatened to assess several of DMA's members for the period in which the newspapers and religious publications were exempt. Thus, the constitutional discrimination for past periods is manifest.

If the District Court of Appeal's decision is not reversed, the Department will have found a way to avoid the due process requirement of meaningful backward-looking relief. This will harm not only Sharper Image but the other DMA members and other taxpayers faced with enforcement efforts by the Department predicated on unconstitutional statutes.

III. Failure To Reverse The District Court of Appeal's Decision Would Have Profound Repercussions For DMA's Members And Other Taxpayers In Jurisdictions Throughout the United States, Including Florida

The Florida remedial statute which was relied upon by the court below, Fla. Stat. Ann. § 212.21, is not unique. At least fifteen other states have laws that could similarly bar retroactive relief where a statutory tax provision is found to be unconstitutional. Taken at face value, those statutes purport to limit the remedy available to taxpayers like Sharper Image to removal of the offending tax provision on a forward-looking basis. *See, e.g.*, Alaska Stat. § 01.10.030 (1998) (applying the Florida rule--no apparent backward-looking

remedy in cases where some part of the tax law is deemed unconstitutional); Cal. Gov't Code § 55821 (West 1997) (applying the Florida rule to local transaction and use taxes); Del. Code Ann. Tit. 5, § 1110 (1997) (applying the Florida rule to the taxation of banks and trust companies); 35 Ill. Comp. Stat. Ann. 105/18-18 (West 1996); Kansas Stat. Ann. § 79-2011 (1997) (applying the Florida rule to real property taxes); Minn. Stat. Ann. § 168.76 (West 1986) (applying the Florida rule to the taxation of motor vehicle sales); Miss. Code Ann. § 27-10-23 (Supp. 1998); R.S. Mo. § 1.140 (1997) (applying the Florida rule to all tax statutes); N.J. Stat. Ann. § 54:32B-29 (West 1986) (applying the Florida rule to sales and use taxes); N.Y. Real Prop. Tax Law § 1172 (McKinney 1989) (same rule, regarding real property taxes); R.I. Gen. Laws § 44-7-21 (1997) (identical in material respects to Florida's statute, and providing that a judgment of unconstitutionality shall only invalidate an exemption prospectively); S.C. Code Ann. § 10-52-6 (Michie 1998) (same); S.D. Codified Laws § 10-52-6 (1998) (applying the Florida rule to municipal non-ad valorem taxes); Wash. Rev. Code Ann. § 82.18.900 (West 1997) (applying the Florida rule to solid waste excise taxes); W. Va. Code § 11-21-94 (1998) (applying the Florida rule to personal income taxation).

Court in other states have also followed the Florida approach. For example, in *Thayer v. South Carolina Tax Commission*, 413 S.E.2d 810 (S.C. 1992), the Supreme Court of South Carolina refused to provide a retroactive remedy to a taxpayer because the exemption challenged, while unconstitutional, was not clearly so at the time the tax at issue was collected. More recently, in *H.J. Wilson v. State Tax Commission*, No. 97-CA-00121-SCT, 1998 WL 427261 (Miss. July 30, 1998), the Mississippi Supreme Court refused to provide the retroactive relief of a refund despite finding a tax exemption for newspapers and certain scientific, literary, or educational periodicals unconstitutional.

If the decision of the lower courts is upheld, these states could impose unconstitutionally discriminatory taxes without being required to remedy fully such constitutional violations. This would jeopardize the fundamental protections afforded by the Due Process Clause in contravention of this Court's precedent.

CONCLUSION

In light of the foregoing, *Amicus Curiae* The Direct Marketing Association respectfully submits that the petition for a writ of certiorari should be granted and the case be reversed.

Dated: February 10, 1999

Respectfully submitted,

MARTIN I. EISENSTEIN*
GEORGE S. ISAACSON
DAVID W. BERTONI
BRANN & ISAACSON, LLP
184 Main Street
Lewiston, Maine 04243-3070
(207) 786-3566

ROSCOE B. STAREK, III
Senior Vice President -
Catalog Industry
Direct Marketing Association, Inc.
Washington, D.C.

**Counsel of Record*